

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

MARTHA DENNIS <i>o/b/o GAD</i>, Plaintiff,)	
)	
)	
v.)	CIVIL ACTION NO. 1:19-00331-N
)	
ANDREW M. SAUL, <i>Commissioner of Social Security</i>, Defendant.)	
)	

MEMORANDUM OPINION AND ORDER

Plaintiff Martha Dennis, on behalf of GAD, a minor, brought this action under 42 U.S.C. § 1383(c)(3) seeking judicial review of a final decision of the Defendant Commissioner of Social Security (“the Commissioner”) denying GAD’s application for supplemental security income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. § 1381, *et seq.*¹ Upon consideration of the parties’ briefs (Docs. 14, 18) and those portions of the administrative record (Doc. 12) relevant to the issues raised, and with the benefit of oral argument, the Court finds that the Commissioner’s final decision is due to be **REVERSED** and **REMANDED** for further administrative proceedings.²

¹ “Title XVI of the Act provides for the payment of disability benefits to indigent persons under the Supplemental Security Income (SSI) program.” *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 42 U.S.C. § 1382(a)).

² With the consent of the parties, the Court has designated the undersigned Magistrate Judge to conduct all proceedings and order the entry of judgment in this civil action, in accordance with 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and S.D. Ala. GenLR 73. (*See* Docs. 20, 22, 23).

I. *Procedural Background*

The subject application for SSI was filed with the Social Security Administration (“SSA”) on GAD’s behalf on April 19, 2016. After it was initially denied, GAD requested a hearing before an Administrative Law Judge (“ALJ”) with the SSA’s Office of Disability Adjudication and Review. A hearing was held on June 12, 2018; on September 6, 2018, the ALJ issued an unfavorable decision on GAD’s application, finding GAD not disabled under the Social Security Act and thus not entitled to benefits. (*See* Doc. 12, PageID.64-80).

The Commissioner’s decision on GAD’s application became final when the Appeals Council denied GAD’s request for review of the ALJ’s unfavorable decision on May 15, 2019. (*Id.*, PageID.53-57). Dennis, on GAD’s behalf, subsequently brought this action under § 1383(c)(3) for judicial review of the Commissioner’s final decision. *See* 42 U.S.C. § 1383(c)(3) (“The final determination of the Commissioner of Social Security after a hearing [for SSI benefits] shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner’s final determinations under section 405 of this title.”); 42 U.S.C. § 405(g) (“Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.”); *Ingram v. Comm’r of Soc. Sec. Admin.*, 496 F.3d 1253, 1262 (11th Cir. 2007) (“The settled law of this Circuit is that

a court may review, under sentence four of section 405(g), a denial of review by the Appeals Council.”).

II. *Standards of Review*

“In Social Security appeals, [the Court] must determine whether the Commissioner’s decision is ‘ “supported by substantial evidence and based on proper legal standards. Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion.” ’ ” *Winschel v. Comm’r of Soc. Sec.*, 631 F.3d 1176, 1178 (11th Cir. 2011) (quoting *Crawford v. Comm’r of Soc. Sec.*, 363 F.3d 1155, 1158 (11th Cir. 2004) (per curiam) (internal citation omitted) (quoting *Lewis v. Callahan*, 125 F.3d 1436, 1439 (11th Cir. 1997))). In reviewing the Commissioner’s factual findings, the Court “ ‘may not decide the facts anew, reweigh the evidence, or substitute our judgment for that of the [Commissioner].’ ” *Id.* (quoting *Phillips v. Barnhart*, 357 F.3d 1232, 1240 n.8 (11th Cir. 2004) (alteration in original) (quoting *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983))). “ ‘Even if the evidence preponderates against the [Commissioner]’s factual findings, [the Court] must affirm if the decision reached is supported by substantial evidence.’ ” *Ingram*, 496 F.3d at 1260 (quoting *Martin v. Sullivan*, 894 F.2d 1520, 1529 (11th Cir. 1990)).

Put another way, “[u]nder the substantial evidence standard, we cannot look at the evidence presented to [an administrative agency] to determine if interpretations of the evidence other than that made by the [agency] are possible. Rather, we review the evidence that was presented to determine if the findings

made by the [agency] were unreasonable. To that end, [judicial] inquiry is highly deferential and we consider only whether there is substantial evidence for the findings made by the [agency], *not* whether there is substantial evidence for some *other* finding that could have been, but was not, made. That is, even if the evidence could support multiple conclusions, we must affirm the agency's decision unless there is no reasonable basis for that decision.” *Adefemi v. Ashcroft*, 386 F.3d 1022, 1029 (11th Cir. 2004) (en banc) (citations and quotation omitted).³

“Yet, within this narrowly circumscribed role, [courts] do not act as automatons. [The Court] must scrutinize the record as a whole to determine if the decision reached is reasonable and supported by substantial evidence[.]” *Bloodsworth*, 703 F.2d at 1239 (citations and quotation omitted). *See also Owens v.*

³ *See also Barnes v. Sullivan*, 932 F.2d 1356, 1358 (11th Cir. 1991) (per curiam) (“The court need not determine whether it would have reached a different result based upon the record” because “[e]ven if we find that the evidence preponderates against the [Commissioner]'s decision, we must affirm if the decision is supported by substantial evidence.”); *Edwards v. Sullivan*, 937 F.2d 580, 584 n.3 (11th Cir. 1991) (under the substantial evidence standard, “we do not reverse the [Commissioner] even if this court, sitting as a finder of fact, would have reached a contrary result...”); *Hunter v. Soc. Sec. Admin., Comm'r*, 808 F.3d 818, 822 (11th Cir. 2015) (“In light of our deferential review, there is no inconsistency in finding that two successive ALJ decisions are supported by substantial evidence even when those decisions reach opposing conclusions. Faced with the same record, different ALJs could disagree with one another based on their respective credibility determinations and how each weighs the evidence. Both decisions could nonetheless be supported by evidence that reasonable minds would accept as adequate.”); *Barron v. Sullivan*, 924 F.2d 227, 230 (11th Cir. 1991) (“Substantial evidence may even exist contrary to the findings of the ALJ, and we may have taken a different view of it as a factfinder. Yet, if there is substantially supportive evidence, the findings cannot be overturned.”); *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), *as amended on reh'g* (Aug. 9, 2001) (“If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner.”).

Heckler, 748 F.2d 1511, 1516 (11th Cir. 1984) (per curiam) (“We are neither to conduct a de novo proceeding, nor to rubber stamp the administrative decisions that come before us. Rather, our function is to ensure that the decision was based on a reasonable and consistently applied standard, and was carefully considered in light of all the relevant facts.”). “In determining whether substantial evidence exists, [a court] must...tak[e] into account evidence favorable as well as unfavorable to the [Commissioner’s] decision.” *Chester v. Bowen*, 792 F.2d 129, 131 (11th Cir. 1986). See also *McCruiter v. Bowen*, 791 F.2d 1544, 1548 (11th Cir. 1986) (“We are constrained to conclude that the administrative agency here...reached the result that it did by focusing upon one aspect of the evidence and ignoring other parts of the record. In such circumstances we cannot properly find that the administrative decision is supported by substantial evidence. It is not enough to discover a piece of evidence which supports that decision, but to disregard other contrary evidence. The review must take into account and evaluate the record as a whole.”).⁴

⁴ Nevertheless, “district court judges are not required to ferret out delectable facts buried in a massive record,” *Chavez v. Sec’y Fla. Dep’t of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) (28 U.S.C. § 2254 habeas proceedings), and “ [t]here is no burden upon the district court to distill every potential argument that could be made based on the materials before it...’ ” *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1239 (11th Cir. 2012) (per curiam) (Fed. R. Civ. P. 56 motion for summary judgment) (quoting *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (en banc)) (ellipsis added). Additionally, the Eleventh Circuit Court of Appeals, whose review of Social Security appeals “is the same as that of the district court[.]” *Miles v. Chater*, 84 F.3d 1397, 1400 (11th Cir. 1996) (per curiam), generally deems waived claims of error not fairly raised in the district court. See *Stewart v. Dep’t of Health & Human Servs.*, 26 F.3d 115, 115-16 (11th Cir. 1994) (“As a general principle, [the court of appeals] will not address an argument that has not been raised in the district court...Because Stewart did not present any of his assertions in the district court, we decline to consider them on appeal.” (applying rule in

Moreover, the “substantial evidence” “standard of review applies only to findings of fact. No similar presumption of validity attaches to the [Commissioner]’s conclusions of law, including determination of the proper standards to be applied in reviewing claims.” *MacGregor v. Bowen*, 786 F.2d 1050, 1053 (11th Cir. 1986) (quotation omitted). *Accord, e.g., Wiggins v. Schweiker*, 679 F.2d 1387, 1389 (11th Cir. 1982) (“Our standard of review for appeals from the administrative denials of Social Security benefits dictates that ‘(t)he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive ...’ 42 U.S.C.A. s 405(g) ... As is plain from the statutory language, this deferential standard of review is applicable only to findings of fact made by the Secretary, and it is well established that no similar presumption of validity attaches to the

appeal of judicial review under 42 U.S.C. §§ 405(g), 1383(c)(3)); *Crawford*, 363 F.3d at 1161 (same); *Hunter v. Comm’r of Soc. Sec.*, 651 F. App’x 958, 962 (11th Cir. 2016) (per curiam) (unpublished) (same); *Cooley v. Comm’r of Soc. Sec.*, 671 F. App’x 767, 769 (11th Cir. 2016) (per curiam) (unpublished) (“As a general rule, we do not consider arguments that have not been fairly presented to a respective agency or to the district court. *See Kelley v. Apfel*, 185 F.3d 1211, 1215 (11th Cir. 1999) (treating as waived a challenge to the administrative law judge’s reliance on the testimony of a vocational expert that was ‘not raise[d] . . . before the administrative agency or the district court’.”); *In re Pan Am. World Airways, Inc., Maternity Leave Practices & Flight Attendant Weight Program Litig.*, 905 F.2d 1457, 1462 (11th Cir. 1990) (“[I]f a party hopes to preserve a claim, argument, theory, or defense for appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize and rule on it.”); *Jones v. Apfel*, 190 F.3d 1224, 1228 (11th Cir. 1999) (applying *In re Pan American World Airways* in Social Security appeal); *Sorter v. Soc. Sec. Admin., Comm’r*, 773 F. App’x 1070, 1073 (11th Cir. 2019) (per curiam) (unpublished) (“Sorter has abandoned on appeal the issue of whether the ALJ adequately considered her testimony regarding the side effects of her pain medication because her initial brief simply mentions the issue without providing any supporting argument. *See Singh v. U.S. Att’y Gen.*, 561 F.3d 1275, 1278–79 (11th Cir. 2009) (explaining that ‘simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue’.”).

Secretary's conclusions of law, including determination of the proper standards to be applied in reviewing claims." (some quotation marks omitted). This Court "conduct[s] 'an exacting examination' of these factors." *Miles v. Chater*, 84 F.3d 1397, 1400 (11th Cir. 1996) (per curiam) (quoting *Martin v. Sullivan*, 894 F.2d 1520, 1529 (11th Cir. 1990)). "The [Commissioner]'s failure to apply the correct law or to provide the reviewing court with sufficient reasoning for determining that the proper legal analysis has been conducted mandates reversal." *Ingram*, 496 F.3d at 1260 (quoting *Cornelius v. Sullivan*, 936 F.2d 1143, 1145-46 (11th Cir. 1991)). *Accord Keeton v. Dep't of Health & Human Servs.*, 21 F.3d 1064, 1066 (11th Cir. 1994).

In sum, courts "review the Commissioner's factual findings with deference and the Commissioner's legal conclusions with close scrutiny." *Doughty v. Apfel*, 245 F.3d 1274, 1278 (11th Cir. 2001). *See also Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005) (per curiam) ("In Social Security appeals, we review *de novo* the legal principles upon which the Commissioner's decision is based. *Chester v. Bowen*, 792 F.2d 129, 131 (11th Cir. 1986). However, we review the resulting decision only to determine whether it is supported by substantial evidence. *Crawford v. Comm'r of Soc. Sec.*, 363 F.3d 1155, 1158–59 (11th Cir. 2004).").

"Eligibility for...SSI requires that the claimant be disabled. 42 U.S.C. §...1382(a)(1)-(2)." *Thornton v. Comm'r, Soc. Sec. Admin.*, 597 F. App'x 604, 609 (11th Cir. 2015) (per curiam) (unpublished).⁵ "An individual under the age of 18

⁵ In this Circuit, "[u]npublished opinions are not considered binding precedent, but

shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(C)(i). “Notwithstanding [§ 1382c(C)](i), no individual under the age of 18 who engages in substantial gainful activity ... may be considered to be disabled.” *Id.* § 1382c(C)(ii).

The Social Security Administration uses a sequential, three-step analysis to determine whether a child is disabled. The claimant must establish (1) whether the child is working; (2) whether the child has a severe impairment or combination of impairments; and (3) whether the child's impairment or combination of impairments meets, medically equals, or functionally equals the severity of an impairment in the Listing of Impairments. 20 C.F.R. § 416.924(a); *id.* Pt. 404, Subpt. P, App. 1...

...To determine whether an impairment or combination of impairments “functionally equals” a listed impairment, the administrative law judge assesses the claimant on six domains, including (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for himself; and (6) health and physical well-being. *Id.* §§ 416.926a(a), (b)(1), (d). The claimant must establish that he suffers from an “extreme” limitation in one of the domains, or “marked” limitations in two of the domains. *Id.* § 416.926a(a). A “marked” limitation is one that “interferes seriously with [the claimant's] ability to independently initiate, sustain, or complete activities.” *Id.* § 416.926a(e)(2)(i). “‘Marked’ limitation also means a limitation that is ‘more than moderate’ but ‘less than extreme.’ It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.” *Id.*

they may be cited as persuasive authority.” 11th Cir. R. 36-2. *See also Henry v. Comm’r of Soc. Sec.*, 802 F.3d 1264, 1267 n.1 (11th Cir. 2015) (per curiam) (“Cases printed in the Federal Appendix are cited as persuasive authority.”).

Parks ex rel. D.P. v. Comm'r, Soc. Sec. Admin., 783 F.3d 847, 850-51 (11th Cir. 2015).⁶ “The burden lies with the claimant to prove that he meets or equals a Listing.” *Gray ex rel. Whymss v. Comm'r of Soc. Sec.*, 454 F. App'x 748, 750 (11th Cir. 2011) (per curiam) (unpublished) (citing *Barron v. Sullivan*, 924 F.2d 227, 229 (11th Cir. 1991)). However, “the Commissioner of Social Security has an obligation to develop a full and fair record.” *Shnorr v. Bowen*, 816 F.2d 578, 581 (11th Cir. 1987). See also *Ellison v. Barnhart*, 355 F.3d 1272, 1276 (11th Cir. 2003) (per curiam) (“It is well-established that the ALJ has a basic duty to develop a full and fair record. Nevertheless, the claimant bears the burden of proving that he is disabled, and, consequently, he is responsible for producing evidence in support of his claim.” (citations omitted)). “This is an onerous task, as the ALJ must scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts. In determining whether a claimant is disabled, the ALJ must consider the evidence as a whole.” *Henry v. Comm'r of Soc. Sec.*, 802 F.3d 1264, 1267 (11th Cir. 2015) (per curiam) (citation and quotation omitted). Nevertheless, “‘there is no rigid requirement that the ALJ specifically refer to every piece of evidence in his decision, so long as the ALJ's decision ... is not a broad rejection which is not enough to enable [a reviewing court] to conclude that the ALJ considered [the claimant's] medical condition as a whole.’” *Mitchell v. Comm'r, Soc. Sec. Admin.*, 771 F.3d 780, 782 (11th Cir. 2014) (quoting *Dyer v. Barnhart*, 395 F.3d 1206, 1211 (11th Cir. 2005) (per curiam) (quotation and brackets omitted)).

⁶ The Court will hereinafter use “Step One,” “Step Two,” and “Step Three” when referencing individual steps of this sequential evaluation.

When the ALJ denies benefits and the Appeals Council denies review of that decision, the Court “review[s] the ALJ’s decision as the Commissioner’s final decision.” *Doughty*, 245 F.3d at 1278. But “when a claimant properly presents new evidence to the Appeals Council, a reviewing court must consider whether that new evidence renders the denial of benefits erroneous.” *Ingram*, 496 F.3d at 1262. Nevertheless, “when the [Appeals Council] has denied review, [the Court] will look only to the evidence actually presented to the ALJ in determining whether the ALJ’s decision is supported by substantial evidence.” *Falge v. Apfel*, 150 F.3d 1320, 1323 (11th Cir. 1998).

III. *Summary of the ALJ’s Decision*

At Step One, the ALJ determined that GAD was an adolescent and had not engaged in substantial gainful activity since the application date, April 19, 2016. (Doc. 12, PageID.70).⁷ At Step Two, the ALJ determined that GAD had the following severe impairments: gastroesophageal reflux disease (GERD), constipation, attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), asthma, and allergic rhinitis. (Doc. 12, PageID.70). At Step Three, the ALJ found that GAD did not have an impairment or combination of impairments that met, medically equaled, or functionally equaled the severity of a specified impairment in Appendix 1 of the Listing of Impairments, 20 C.F.R. § 404, Subpt. P, App. 1. (Doc. 12, PageID.70-80). In determining that GAD did not

⁷ “For SSI claims, a claimant becomes eligible in the first month where she is both disabled and has an SSI application on file.” *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005) (per curiam) (citing 20 C.F.R. § 416.202–03 (2005)).

functionally equal a Listing, the ALJ found that GAD had marked limitation in the domain of attending and completing tasks, and “less than marked” limitations in the remaining 5 domains (*see id.*) – thus failing to satisfy the requirement that a child applicant demonstrate either an “extreme” limitation in one of the domains or “marked” limitations in two. Accordingly, the ALJ found that GAD was not under a disability as defined by the Social Security Act during the relevant adjudicatory period. (*Id.*, PageID.80).

IV. *Analysis*

Dennis’s sole claim of reversible error is that the ALJ did not fully consider GAD’s school records – in particular, an Individual Education Program (IEP) for GAD’s 2018-2019 school year (Doc. 12, PageID.597-604) – in finding that GAD had less than marked limitation in the domain of acquiring and using information. The undersigned agrees.

In finding less than marked limitation in the domain of acquiring and using information, the ALJ cited the following evidence:

Ms. Dennis stated that the claimant has no problems in seeing, hearing, and talking (Exhibit B1E). Ms. Dennis stated that the claimant has no problems with his academic progression (Exhibit B1E). On March 10, 2016, the claimant’s preschool completed and signed an Individual Education Program (Exhibit B4F). The IED [sic] stated that the claimant “will attend the special education preschool class at Foley Elementary two half days per week.” (Exhibit B4F). The claimant is four years old (Exhibit B4F). The IEP also stated that the claimant “understand and follows spoken directions, expresses wants and needs, points to or names a variety of pictures/objects/actions, responds to questions, engages in conversations with peers/adults, uses two to five work phrases and refers to self by name.” (Exhibit B4F). The IEP stated that the

claimant “demonstrates appropriate book handling skills, matches and sorts objects by specific characteristics, states whether he is a boy or girl and points to or names body parts. He can identify environmental print, such as McDonald’s.” (Exhibit B4F). Dr. Harper stated that the claimant has less than marked limitation in acquiring and using information (Exhibit B2A).

(Doc. 12, PageID.75).

Under Social Security Ruling (SSR) 09-3p, 2009 WL 396025 (Feb. 17, 2009),⁸ information in IEPs appears to be highly relevant in assessing the domain of acquiring and using information.⁹ Certainly, the ALJ found GAD’s March 2016 IEP

⁸ “Social Security Rulings are agency rulings published under the Commissioner’s authority and are binding on all components of the Administration. *Sullivan v. Zebley*, 493 U.S. 521, 531 n. 9, 110 S. Ct. 885, 891 n. 9, 107 L. Ed. 2d 967 (1990). Even though the rulings are not binding on [federal courts], [they are] nonetheless accord[ed] great respect and deference, if the underlying statute is unclear and the legislative history offers no guidance. *B. ex rel. B. v. Schweiker*, 643 F.2d 1069, 1071 (5th Cir. 1981).” *Klawinski v. Comm’r of Soc. Sec.*, 391 F. App’x 772, 775 (11th Cir. 2010) (per curiam) (unpublished).

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Because much of a preschool or school-age child’s learning takes place in a school setting, preschool and school records are often a significant source of information about limitations in the domain of “Acquiring and using information.” Poor grades or inconsistent academic performance are among the more obvious indicators of a limitation in this domain provided they result from a medically determinable mental or physical impairment(s). Other indications in school records that a mental or physical impairment(s) may be interfering with a child’s ability to acquire and use information include, but are not limited to:

- Special education services, such as assignment of a personal aide who helps the child with classroom activities in a regular classroom, remedial or compensatory teaching methods for academic subjects, or placement in a self-contained classroom.

to be relevant in assessing that domain. However, as Dennis correctly points out, the ALJ's assessment wholly omitted discussion of the later 2018-2019 IEP.

The ALJ did discuss the 2018-2019 IEP in a general synopsis of the record evidence preceding his consideration of the 6 functional equivalence domains. While the ALJ acknowledging that IEP's notation that GAD would be repeating kindergarten for the 2018-2019 school year, the ALJ largely highlighted positive portions of the IEP stating that, "[i]n language arts," GAP "is able to identify pictures people, objects and animals[, and] is able to look and listen attentively at a reader while a story is being read[; i]n math ... is able to count to 30 and ... recognizes 7 out of 8 shapes[; and w]hen writ[ing], ... is able to make purposeful

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- Related services to help the child benefit from special education, such as occupational, physical, or speech/language therapy, or psychological and counseling services.
 - Other accommodations made for the child's impairment(s), both inside and outside the classroom, such as front-row seating in the classroom, more time to take tests, having tests read to the student, or after-school tutoring.

The kind, level, and frequency of special education, related services, or other accommodations a child receives can provide helpful information about the severity of the child's impairment(s). However, the lack of such indicators does not necessarily mean that a child has no limitations in this domain. For various reasons, some children's limitations may go unnoticed until well along in their schooling, or the children may not receive the services that they need.¹¹ Therefore, when we assess a child's abilities in any of the domains, we must compare the child's functioning to the functioning of same-age children without impairments based on all relevant evidence in the case record.

marks such as lines and circles.” (*Id.*, PageID.73 (quotation marks omitted) (alterations added)). However, the ALJ only quoted from the section of the 2018-2019 IEP asking the preparer to highlight “the student’s strengths in academic and functional areas.” (*Id.*, PageID.597).

As Dennis points out, the ALJ omitted discussion of more limiting aspects of the 2018-2019 IEP, which included GAD’s inability to recognize all letters of the alphabet or the sounds of the alphabet, inability to identify numerals 1-10 or count to 100 by ones, and inability to write GAD’s own name or trace accurately. (*Id.*, PageID.597, 600-602). The 2018-2018 IEP also pointed out that GAD would be receiving supplementary aids and services in addition to special education, which included “a peer helper, reinforcing of concepts, preferential seating, extended time, materials read orally, and tests taken in a resource setting.” (*Id.*, PageID.603). In particular, the ALJ failed to mention an Annual Progress Report included at the end of the IEP, in which GAD’s teacher noted that GAD had made no progress in goals for the prior school year, and that the teacher was “concerned about [GAD’s] lack of achievement.” (*Id.*, PageID.604). The teacher further noted that while GAD’s excessive absences did “not help, [GAD] struggles even when ... here for many days.” (*Id.*).

The ALJ also stated that he relied on the medical opinion of Dr. Howard Harper, Jr., and on Dennis’s statements in a Function Report she had completed about GAD, in finding that GAD had less than marked limitation in acquiring and using information. The ALJ stated that he gave Dr. Harper’s opinion “significant

weight” because Dr. Harper “had the opportunity to review of the medical evidence of record as a whole.” (*Id.*, PageID.74). However, Dr. Harper rendered his opinion on July 5, 2016. (*Id.*, PageID.129). While Dr. Harper may very well have reviewed the record as a whole as it existed at the time of his opinion, a substantial amount of evidence that was before the ALJ, including the 2018-2019 IEP, was dated after Dr. Harper rendered his opinion. And the Function Report was prepared by Dennis even earlier than Dr. Harper’s opinion, on April 26, 2016. (*See id.*, PageID.301). Accordingly, neither Dr. Harper’s opinion nor the Function Report make up for the ALJ’s failure to consider the 2018-2019 IEP in analyzing the domain of acquiring and using information.

Given the ALJ’s selective quoting of the 2018-2019 IEP in his general discussion of the evidence, and his complete failure to mention it at all in evaluating the domain of attending and completing tasks – instead relying only on the earlier IEP from 2016, as well as opinions rendered in 2016 – the undersigned cannot conclude that the ALJ sufficiently considered the record as a whole in assessing the domain of acquiring and using information, or that his finding of less than marked limitation in that domain is supported by substantial evidence. Moreover, this error cannot be considered harmless – as the ALJ found that GAD had marked limitation in another domain, a finding of at least a marked limitation in this domain would have resulted in GAD being found disabled. Accordingly, reversible error has been shown.

Dennis requests that the Commissioner's decision "be reversed and [GAD] found disabled[,]" and only requests a remand for further proceedings in the alternative. (Doc. 14, PageID.638). The Eleventh Circuit has recognized that generally remand to the Commissioner for further proceedings is warranted where "the ALJ has failed to apply the correct legal standards." *Davis v. Shalala*, 985 F.2d 528, 534 (11th Cir. 1993). Moreover, the United States Supreme Court has cautioned that a court reviewing an agency decision "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (citation and quotations omitted). While this Court may enter an order "awarding disability benefits where the [Commissioner] has already considered the essential evidence and it is clear that the cumulative effect of the evidence establishes disability without any doubt[,]" *Davis*, 985 F.2d at 534, Dennis has failed to convince the undersigned that this standard is met here.¹⁰ First, the reversible error was based

¹⁰ *Compare Carnes v. Sullivan*, 936 F.2d 1215, 1219 (11th Cir. 1991) ("The credibility of witnesses is for the Secretary to determine, not the courts ... The decision of the Secretary here, however, rests not so much on the credibility of the 'history of pain; presented by Carnes, as on the adoption of a legal standard improper under Listing 10.10(A). [T]he record in this case is fully developed and there is no need to remand for additional evidence. Based on the facts adduced below and after application of the proper legal standard, we hold that claimant met the requirements of Listing 10.10(A) as early as 1982."), *with Broughton v. Heckler*, 776 F.2d 960, 962 (11th Cir. 1985) (per curiam) ("Though we have found that the ALJ erred in his application of the legal standards, at this time we decline to enter an order requiring entitlement to disability benefits. While it is true that the

on the ALJ's failure to consider relevant evidence. Second, the undersigned is not convinced that, on remand, the Commissioner, after properly considering all relevant evidence, will be unable to cite substantial evidence to support a finding of less than marked limitation in the domain of acquiring and using information.

Accordingly, the Commissioner's final decision denying GAD's application for benefits is due to be **REVERSED** and **REMANDED** to the Commissioner under sentence four of § 405(g) for further administrative proceedings consistent with this decision.

V. Conclusion

In accordance with the foregoing analysis, it is **ORDERED** that the Commissioner's final decision denying GAD's April 19, 2016 application for SSI is **REVERSED** and **REMANDED** under sentence four of 42 U.S.C. § 405(g), *see Melkonyan v. Sullivan*, 501 U.S. 89 (1991), for further proceedings consistent with this opinion. This remand under sentence four of § 405(g) makes Dennis a

opinions of Drs. Todd and Raybin provide strong evidence of disability, it is at least arguable that the report of Dr. Morse is to the contrary. Consequently, it is appropriate that the evidence be evaluated in the first instance by the ALJ pursuant to the correct legal standards.”), *and Hildebrand v. Comm'r of Soc. Sec.*, No. 6:11-CV-1012-ORL-31, 2012 WL 1854238, at *7 (M.D. Fla. May 4, 2012) (“The errors noted here compel a return of the case to the Commissioner to evaluate the evidence and make findings in the first instance. For the reasons set forth above, the Court finds that certain of the conclusions of the ALJ were not made in accordance with proper legal standards and are not supported by substantial evidence. The Court does not find that only one conclusion can be drawn from the evidence; but that the conclusion that was drawn did not meet the standard of review. Under such a circumstance, it would not be appropriate for this Court to substitute its opinion of the weight to be given the evidence for that of the Commissioner. While the Court has the power to do just that in an appropriate case, the Court finds this is not such a case.”), *report and recommendation adopted*, No. 6:11-CV-1012-ORL-31, 2012 WL 1854249 (M.D. Fla. May 21, 2012).

prevailing party for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412, see *Shalala v. Schaefer*, 509 U.S. 292 (1993), and terminates this Court’s jurisdiction over this matter.

Should GAD be awarded Social Security benefits on the subject application following this remand, under Federal Rule of Civil Procedure 54(d)(2)(B), the Court hereby grants Dennis’s counsel an extension of time in which to file a motion for fees under 42 U.S.C. § 406(b) until 30 days after the date of receipt of a notice of award of benefits from the SSA.¹¹ Consistent with 20 C.F.R. § 422.210(c), “the date of receipt of notice ... shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.” If multiple award notices are issued, the time for filing a § 406(b) fee motion shall run from the date of receipt of the latest-dated notice.

Final judgment shall issue separately hereafter in accordance with this order and Federal Rule of Civil Procedure 58.

DONE and ORDERED this the 30th day of March 2020.

/s/ Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE

¹¹ See *Bergen v. Comm’r of Soc. Sec.*, 454 F.3d 1273, 1277 (11th Cir. 2006) (per curiam) (“Fed. R. Civ. P. 54(d)(2) applies to a § 406(b) attorney’s fee claim.”); *Blitch v. Astrue*, 261 F. App’x 241, 242 n.1 (11th Cir. 2008) (per curiam) (unpublished) (“In *Bergen v. Comm’r of Soc. Sec.*, 454 F.3d 1273 (11th Cir. 2006), we suggested the best practice for avoiding confusion about the integration of Fed. R. Civ. P. 54(d)(2)(B) into the procedural framework of a fee award under 42 U.S.C. § 406 is for a plaintiff to request and the district court to include in the remand judgment a statement that attorneys fees may be applied for within a specified time after the determination of the plaintiff’s past due benefits by the Commission. 454 F.3d at 1278 n.2.”).